United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Sidney Weinschneider

Bankruptcy No. 89 B 17026 Adversary No. 98 A 472

Adversary Caption: Daniel Hoseman, Trustee, vs. Sidney Weinschneider, G.W. Burton and Assoc., Ltd, Burton Behr, and Harold Geiser

Date of Issuance: February 27, 2001

Judge: Ginsberg

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re:	)	**Chapter 7**
	)	
Sidney Weinschneider,	)	**Case No. 89 B 17026**
	)	
Debtor.	)	**Hon. Robert E. Ginsberg**
----------)		
Daniel Hoseman, Trustee,	)	
Plaintiff,	)	
	)	
v.	)	**Adv. No. 98 A 00472**
	)	
Sidney Weinschneider, G.W. Burton and Associates, Ltd., Burton Behr, and Harold Geiser,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Introduction

This matter is before the Court on Debtor/Defendant Sidney Weinschneider's ("Debtor") motion for Judgment on Partial Findings under Federal Rule of Bankruptcy Procedure 7052 with respect to the complaint for declaratory judgment filed by Daniel Hoseman, Trustee ("Trustee"). The Trustee seeks a declaratory judgment finding that the cause of action, Sidney Weinschneider v. G.W. Burton & Assoc., Ltd., Burton W. Behr and Harold Geiser, Cook County case number 96 L 1371, now pending in the Circuit Court of Cook County, Illinois, is property of the Debtor's bankruptcy estate. This Court, in a Memorandum Opinion and Order dated August 3, 1999, granted summary judgment in favor of the Trustee, finding that the suit is property of the estate. However, the Debtor asserted an affirmative defense in response to the Trustee's adversary complaint; the Debtor argued

that a Release and Covenant Not to Sue, signed by the Trustee (attached as Exhibits B and C to Debtor's Second Amended Defense, filed with this Court on May 26, 1998), bars the Trustee's complaint. This Court, in the August 3, 1999 Opinion, denied summary judgment with respect to the affirmative defense, which is the subject of the instant proceeding.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334(b) as a matter arising under § 541 of the Bankruptcy Code. This matter is a core proceeding under 28 U.S.C. §§157(b)(2)(E) and (O), and is before the Court pursuant to Internal Operating Procedure 15(a) (formerly known as Local Rule 2.33) of the United States District Court for the Northern District of Illinois, which automatically refers bankruptcy cases and proceedings to this Court for hearing and determination.

Facts

The relevant facts, as set forth in this Court's August 30, 1999 Memorandum Opinion and Order, are attached hereto and adopted herein solely for the purpose of the resolution of the instant motion. Additional, relevant facts pertaining to the release and the Debtor's disclosure of his interest in G.W. Burton were brought to light by the testimony of witnesses at a trial held between April and June, 2000. Much of the testimony at that trial centered on an amended Schedule B-3, filed by the Debtor on June 12, 1995. The amended B-3 is discussed more fully in this Court's August 3, 1999 Opinion. The amended B-3 itself does not disclose any pre-petition negotiations that resulted in the 23% ownership interest in G.W. Burton claimed by the Debtor. Instead, it states that the Debtor's claim to the interest in G.W. Burton arose-post petition. However, as this Court found in the August 30, 2000

Opinion, the Debtor met with Home Savings representatives for more than nine hours on September 25, 1989, prior to the bankruptcy filing on October 10, 1989. During that meeting, those present discussed an entity named G.W. Burton, which would include Behr and Geiser, to manage the nursing homes. Another meeting was held on October 12, 1989, two days after the Debtor's bankruptcy petition was filed.

Discussion

The Debtor contends that a Judgment on Partial Finding under Rule 7052 is warranted because the Trustee has failed to prove fraud or mutual mistake of fact by clear and convincing evidence.[1] The Trustee argues that he has met his burden.

Clear and convincing evidence is not synonymous with uncontradicted, unimpeached, crystal clear or perfect testimony. Cronin v. McCarthy, 637 N.E.2d 668, 675 (IL App. Ct. 1994). Rather, it is evidence that is "highly probably true." Id. Clear and convincing evidence has been defined as "the quantum of proof which leaves no reasonable doubt in the mind of the fact finder as to the veracity of the proposition in question." Matter of Jones, 673 N.E.2d 703, 706 (IL App. Ct. 1996). Although stated in terms of reasonable doubt, clear and convincing evidence is more than a preponderance but is not quite approaching the degree of proof necessary to convict a person of a criminal offense. Bazydlo v. Volant, 647 N.E.2d 273, 276 (IL 1995).

The instant motion is governed by Bankruptcy Rule 7052, which provides that F.R. Civ. P. applies in adversary proceedings. Rule 52(c) provides:

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[1] This Court, in an oral ruling on April 3, 2000, ruled that the Trustee has the burden of proving that the release is not valid by clear and convincing evidence.

> **Judgment on Partial Findings.** If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. . . .

A motion for judgment under Rule 52(c) should be granted if the plaintiff fails to make out a prima facie case, or if the court determines that the evidence goes against the plaintiff's claim. Regency Holdings (Cayman), Inc. v. Microcap Fund, Inc. (In re Regency Holdings (Cayman), Inc., 216 B.R. 371, 374 (Bankr. S.D. NY 1998). In ruling on a Rule 52(c) motion, the court does not evaluate the evidence under the standards which govern a directed verdict, and does not draw any special inferences in the nonmovant's favor, or consider the evidence in the light most favorable to the nonmoving party Id. In a motion under Rule 52(c), the court acts as both judge and jury, weighing the evidence, resolving conflicts, and deciding which side the evidence supports. Id.

The instant proceeding involves a release and covenant not to sue signed by the Chapter 7 Trustee. A release, as with any contract, may be set aside if there is fraud in the inducement. Havoco of America, Ltd. v. Sumitomo Corp. of America, 971 F.2d 1332, 1341 (7th Cir. 1992). The elements of fraud in the inducement, which the Trustee must prove by clear and convincing evidence, are: 1) a false statement of material fact; 2) known or believed to be false by the person making it; 3) made with the intent to induce the other party to act; 4) action by the other party in reliance on the truth of the statement; and 5) damage to the other party resulting from such reliance. Id. Additionally, the omission or concealment of a material fact when one has the opportunity and duty to speak also amounts to fraudulent misrepresentation. Id.

This Court holds that the Trustee has met his burden. The testimony presented at trial, along with the exhibits admitted into evidence, indicate clearly and convincingly that the Debtor made a false statement of material fact on his Amended Schedule B-3, which was filed on June 12, 1995.

The amended B-3 stated:

> Debtor amends Schedule B-3 to list a post-petition acquired claim that is not property of the bankruptcy estate. This amendment is made for disclosure purposes only and does not make this claim property of the bankruptcy estate. . . .
>
> The debtor's claim for this interest is not property of the bankruptcy estate because the interest was acquired after the 10/10/89 bankruptcy filing and the debtor did not have any sort of claim for such interest as of the bankruptcy filing. Such claim cannot be characterized as proceeds or other progeny of property of the bankruptcy estate under code § 541(a)(6). Likewise, the interest in G.W. Burton was given to Sidney Weinschneider in exchange for his post-petition services to G.W. Burton.

As this Court found in its August 30, 1999 Opinion, the Debtor met with representatives from Home Savings on September 25, 1989, and discussed both G.W. Burton, and Behr and Geiser, and their management of nursing homes. This meeting was held 15 days prior to the filing of the Debtor's bankruptcy petition on October 10, 1989. This Court found that the state court suit, in which the Debtor seeks ownership of a 23% interest in G.W. Burton, was "significantly related to Weinschneider's pre-bankruptcy activities, i.e., the matters giving rise to the State Court Suit are rooted in Weinschneider's prebankruptcy past." See Segal v. Rochelle, 382 U.S. 375, 380 (1966). Therefore, the Debtor's statement in his Amended Schedule B-3 that the claim was acquired post-petition, and that his interest in

G.W. Burton was given to him in exchange for his post-petition services is a false statement of material fact.

The evidence adduced during the trial also shows that the Debtor knew or believed the statements to be false. In the Debtor's Verified Second Amended Complaint filed in the state court proceedings, he alleged that before October 1989, he had discussions with a representative of Home Savings regarding assembling a management team to take over nursing home management. Thus, the Debtor does not deny that pre-petition meetings took place; he clearly knew that at least one meeting took place before his bankruptcy petition was filed, because he participated in at least one pre-petition meeting. Therefore he knew that the statements that his interest in G.W. Burton was acquired post-petition were false.

The evidence also proves that the Debtor intended to induce the Trustee to act. An intent to deceive may be shown by circumstantial evidence. See Washington Courte Condominium Association-Four v. Washington-Golf Corp., 643 N.E.2d 199, 216 (IL App. Ct. 1994). The finder of fact may logically infer an intent to deceive when a person knowingly or recklessly makes false representations which the person knows or should know will induce another to act. In re Green, 241 B.R. 550, 564-65 (Bankr. N.D. IL 1999). The Debtor's attorneys at various times informed him of the importance of providing accurate information to the Trustee. By failing to disclose the pre-petition roots of his claim against G.W. Burton on the Amended Schedule B-3, the Debtor knew, or at the very least, should have known that concealing his interest in G.W. Burton from the Trustee would induce the Trustee to act, either by releasing any claim by the estate for the interest in G.W. Burton, or by the Trustee determining not to pursue the matter.

The evidence proves that the Trustee acted in justifiable reliance on the truth of Weinschneider's statement in his Amended B-3. A memorandum prepared by Dirk Andringa, one of the Debtor's attorneys at Winston & Strawn, and dated August 17, 1995, stated:

> On or about Friday, August 11, 1995, I spoke with Max Chill regarding Sidney's claim for an interest in G.W. Burton. Max stated that based on the information we had supplied him and if such information were true, that he did not consider Sidney's claim to be property of the bankruptcy estate. He stated that Sidney is allowed to make a living after filing a bankruptcy petition and that he is entitled to keep the compensation he earns for his post-petition service.

The Trustee signed the general release and covenant not to sue on December 6, 1996. As Andringa's memorandum indicates, the Debtor and his attorneys provided information to the Trustee which indicated that the claim was not property of the estate. The Trustee then relied on this information to form his conclusion that the claim was not property of the estate. Because, as Ira Goldberg, one of the Debtor's bankruptcy attorneys testified, the Trustee told him that "the [bankruptcy] schedules were very well done, and one of the better schedules he had seen in his practice," the Trustee's reliance on the schedules as presented was justifiable.

Finally, the Trustee has proved damages. It is undisputed that the Trustee signed a release and covenant not to sue. By doing so, the Trustee would necessarily concede that any and all sums recovered by the Debtor on his state court claim would belong to the Debtor and not his bankruptcy estate. The result hypothesized by the release would clearly result in damage to the estate.

Conclusion

For the above reasons, this Court finds that the Trustee has made out a prima facie case by clear and convincing evidence. Therefore, the Debtor's motion for Judgment on Partial Findings under rule 7052 is denied.

This matter is set for further status on March 6, 2001 at 10:00 a.m.

ENTERED:

Dated: February 27, 2001

Robert E. Ginsberg
United States Bankruptcy Judge